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Appellants:	William E. Harvey, Peggy Jo Kintner, Allen A. Warmus	Docket No.:	17,373
Serial No.:	10/020,637	Group:	3623
Confirmation No.:	9222	Examiner:	Susanna M. Meinecke Diaz
Filed:	December 14, 2001	Date:	May 25, 2007
For:	Method For Estimating The Effect of Characteristics On Product Preference And/Or Concept Performance		

Appeal Brief Transmittal Letter

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37, transmitted herewith is an Amended Appeal Brief pursuant to the Notice of Non-Compliant Appeal Brief which was mailed on May 8, 2007.

Please charge the $500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), which is due to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875.

Respectfully submitted,

WILLIAM E. HARVEY ET AL.

By: Alyssa A. Dudkowski
Alyssa A. Dudkowski
Registration No.: 40,596

CERTIFICATE OF TRANSMISSION

I, Mary L. Marchant, hereby certify that on May 25, 2007 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.

Mary L. Marchant
Mary L. Marchant

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Amended Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to the Notice of Non-Compliant Appeal Brief mailed May 8, 2007, Appellants respectfully submit this amended Brief in support of their Appeal of Examiner Meinecke Diaz' **Final Rejection** of claims 1 – 16 and 19-30, which was mailed on September 22, 2006.

On December 21, 2006, Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal. Thus, the time period for filing this Brief ended on February 26, 2007. An Appeal Brief was filed along with a Petition For One-Month Extension of Time on March 26, 2007.

Real Party in Interest

The real party in interest in this matter is the assignee of record, Kimberly-Clark Worldwide, Inc.

Related Appeals and Interferences

There are no other appeals or interferences known to the Appellants or the Appellants' legal representative that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

K-C Docket No.: 18,996
Serial No.: 10/750,016

Status of Claims

Claims 1 – 30 were originally filed in the application. Claims 1 – 16 and 19 – 30 are subject to final rejection. Claims 17 and 18 were previously canceled. Claims 1 – 16 and 19 – 30 are under appeal, including independent claims 1, 8, 15, 19, 20 and 21. All of the claims are attached hereto in the Claims Appendix.

Status of Amendments

There were no amendments filed after the Final Rejection with regard to the present Application.

Summary of Claimed Subject Matter

The present invention is directed to a method for product preference testing, in particular, a method for accounting for preferences related to an attribute of a product. (See, e.g., Page 1, lines 5-7 of the Specification as filed.)

For example, independent claim 1 is directed to a method for determining preference results for a product having an attribute. (See, e.g., Page 2, lines 23-24 of the Specification as filed.) The method includes a step of calculating a base preference for the product and a step of calculating a downside for the product. (See, e.g., Page 2, lines 24-25 and line 28 of the Specification as filed.) The method also includes the steps of calculating an upside for the product and of comparing the base preference, the downside and the upside to identify product attributes affecting preference results. (See, e.g., Page 2, line 31 and lines 7-9 of the Specification as filed).

Independent claim 8 is directed to a method for developing a product having first and second attributes including calculating a base preference, a downside, and an upside for the first attribute and calculating a base preference, a downside, and an upside for the second attribute. (See, e.g. Page 9, lines 19-29 of the Specification as filed). The method also includes the steps of comparing the calculations to determine which attribute is superior and developing the product with the superior attribute. (See, e.g. Page 9, line 30 to Page 10, line 12 of the Specification as filed).

Independent claim 15 is directed to a method for determining preference results for a product having an attribute including calculating a base preference for the product. (See, e.g. Page 2, lines 23-25 of the Specification as filed). The base preference is an overall preference where no test subject prefers the product on its delivery of the attribute. (See, e.g. Page 2, lines 26-27 of the Specification as

filed). The method also includes calculating a downside for the product where the downside is an overall preference above the base preference attributable to the attribute. (See, e.g. Page 2, lines 28-31 of the Specification as filed). The method further includes a step of calculating an upside for the product where the upside is an overall preference attributable to the maximum potential attribute preference. (See, e.g. Page 2, lines 31-35 of the Specification as filed). Next, the method includes comparing the base preference, the downside and the upside to identify product attributes affecting preference results. (See, e.g. Page 9, lines 6-13 of the Specification as filed).

Independent claim 19 is directed to a method for determining preference results from test subjects attributable to an attribute of a product. (See, e.g. Page 2, lines 23-25 of the Specification as filed). The method includes calculating a base preference for the product where the base preference is the ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute. (See, e.g. Page 2, lines 26-27 of the Specification as filed). The method also includes a step of calculating a downside for the product by taking the difference between the base preference and an overall preference, where the overall preference is the ratio of the number of test subjects who preferred the product overall to the total number of test subjects. (See, e.g. Page 2, lines 28-31 of the Specification as filed). The method further includes a step of calculating an upside for the product by taking the difference between an overall preference and a best preference, where the best preference is the ratio of the number of test subjects who preferred the product both overall and with respect to the attribute to the number of test subjects who preferred the product with respect to the attribute. (See, e.g. Page 2, lines 31-35 of the Specification as filed). Next, the method includes comparing the base preference, the downside and the upside to identify product attributes affecting preference results. (See, e.g. Page 9, lines 6-13 of the Specification as filed).

Independent claim 20 is directed to a test results interpretation system including a computer. (See, e.g. Page 3, lines 1-4 of the Specification as filed). The system also includes a computer code resident on the computer. (See, e.g. Page 3, lines 1-4 of the Specification as filed). The code is adapted to calculate product preference upside and downside based on preference results. (See, e.g. Page 3, lines 9-14 of the Specification as filed). The system further includes a means for incorporating nonpreferential results into the product preference calculation. (See, e.g. Page 3, lines 4-9 of the Specification as filed).

K-C Docket No.: 18,996
Serial No.: 10/750,016

Independent claim 21 is directed to a test results intepretation system including a matrix of responses including preference results by input choices. (See, e.g. Page 3, lines 1-2 of the Specification as filed). The system also includes a computer code resident on a computer adapted to calculate product preference for a product by incorporating preference results and nonpreferential results. (See, e.g. Page 3, lines 3-4 of the Specification as filed).

Grounds of Rejection to be Reviewed on Appeal

1. Rejection of Claims 1-30 under 35 U.S.C. §101 as being directed to non-statutory subject matter.

2. Rejection of Claims 1-16 and 19 under 35 U.S.C. §102(b) as being anticipated by International Publication Number WO 98/18352 A1 to Bauer et al. (hereinafter referred to as "the Bauer publication").

3. Rejection of Claims 20-30 under 35 U.S.C. §103(a) as being unpatentable over the Bauer publication.

Argument

1. Rejection of Claims 1-30 Under 35 U.S.C. §101.

In the Final Office Action mailed September 22, 2006, the Examiner rejects claims 1-30 under 35 U.S.C. §101 as lacking a useful, concrete and tangible result. The Examiner believes that claims 1-30 revolve around the steps of calculating a base preference for a product, calculating a downside for the product and calculating an upside for the product. The Examiner believes that the claimed invention does not incorporate a useful or tangible result. Appellants respectfully submit the following response to this rejection.

With respect to independent claim 1, the Examiner believes the method of independent claim does not provide a useful, tangible result. However, examples of the results provided by the claimed method can be found in the Specification as filed. For example, a comparison of base preference, downside and upside to identify an attribute that drives product preference can be found at page 9, lines 6-13. Fig. 3 and page 9, lines 14-26 provide another example where thirteen attributes of an adult

incontinence garment are evaluated to identify the attributes having the greatest impact on product preference. The Examiner suggests that the claimed method needs to be limited to output on a computer screen or the physical manufacture of a product; Appellants respectfully disagree. Fig. 3 is an example of a tangible result provided by the method of claim 1. For at least these reasons, Appellants respectfully submit that the method of claim 1 provides a useful and tangible result.

Appellants respectfully traverse the rejection with respect to independent claim 8. The useful and tangible result of the method of claim 8 is "developing the product with the superior attribute". As with independent claim 1, an example of the results provided by the method of claim 8 can be found in the Specification as filed. For example, the development of a product with superior attributes is described by Fig. 2 and page 9, line 27 to page 10, line 5. Further, the Examiner does not provide a specific analysis of independent claim 8 in the First Office Action or the Final Office Action and therefore, does not address the utility of the claim element, "developing the product with the superior attribute". For at least these reasons, Appellants respectfully submit that the method of claim 8 provides a useful and tangible result.

Appellants also respectfully traverse the rejection with respect to independent claim 15. The useful and tangible result of the method of claim 15 is the identification of "product attributes affecting preference results". An example of the results provided by the method of claim 15 can be found at page 9, lines 6-13 of the Specification as filed. Further, the Examiner does not provide a specific analysis of independent claim 15 in the First Office Action or the Final Office Action and therefore, does not address the utility of the claim element, "to identify product attributes affecting preference results". For at least these reasons, Appellants respectfully submit that the method of claim 15 provides a useful and tangible result.

Additionally, Appellants respectfully traverse the rejection with respect to independent claim 19. The useful and tangible result of the method of claim 19 is "comparing the base preference, the downside and the upside to identify product attributes affecting preference results". An example of the results provided by the method of claim 19 can be found in Fig. 3 of the Specification as filed. Appellants respectfully submit that the method of claim 19 provides a useful and tangible result.

Appellants respectfully traverse the rejection with respect to independent claim 20. Independent claim 20 is directed to a test results interpretation system including a computer, a computer code resident on the computer and a means for incorporating nonpreferential results into the product preference calculation. Claim 20 is not directed to a method including calculating steps and therefore, it is not clear from the Office Action or the Final Office Action how the Examiner is questioning the utility of this claim. The Examiner does not provide an analysis for claim 20. For at least this reason, Appellants respectfully submit that the method of claim 20 provides a useful and tangible result.

Appellants respectfully traverse the rejection with respect to independent claim 21. Independent claim 21 is directed to a test results interpretation system including a matrix of responses and a computer code resident on a computer. Claim 21 is not directed to a method including calculating steps and therefore, it is not clear from the Office Action or the Final Office Action how the Examiner is questioning the utility of this claim. The Examiner does not provide an analysis for claim 21. For at least this reason, Appellants respectfully submit that the method of claim 21 provides a useful and tangible result.

For at least these reasons, Appellants respectfully request that the rejection of claims 1-30 under 35 U.S.C. §101 be withdrawn.

2. Rejection of Claims 1-16 and 19 Under 35 U.S.C. §102(b).

In order to anticipate, a reference must teach each and every element of the claimed invention. The Bauer publication does not disclose calculating a base preference for the product, calculating a downside for the product or calculating an upside for the product. Page 15 of the Bauer publication reads "In the test summarized below, identical cleaning compositions were placed in similar spray articles, one with a foaming spray nozzle and the other with a non-foaming spray nozzle. Consumers were then asked to use the product to clean food surfaces, including apples. The results are summarized below." At the top of the table, one of the column headings reads "Test Design: Paired Comparison". Page 15 of the Bauer publication does not describe calculating a base preference for the product, calculating downside or calculating an upside as contemplated by the present invention. In fact, the method of the present invention may rely on data collected through a paired comparison test (see Page 6 of the Specification as filed), but it is not the paired comparison test itself.

As described on page 6, lines 6-7 of the Specification as filed, the "Base Preference" of claim 1 is the overall preference that a product would receive regardless of the delivery of a particular attribute. Separately, there is an overall preference that is dependent upon delivery of the attribute; this is the "downside" of claim 1 (page 6, lines 7-10). There is also a level of overall preference that is achievable if delivery of the attribute is improved; this is the "upside" of claim 1 (page 6, lines 10-11). These three different levels of overall preference are not disclosed by the Bauer publication. The table on page 15 of the Bauer publication lists various attributes of a cleaning composition: "Sudsing Preference", "Feels More Slimy", "Easier to Rinse", "Feels Cleaner" and "Removes More Wax From Apples". The Examiner believes that these attributes can be changed to have an effect on preference for the "Foaming Spray Head" versus the "Non-Foaming Spray Head". The Examiner equates the ability to change attributes to the "downside" and "upside" of the claimed method. This is not accurate. There is nothing in the results provided in the table on page 15 of the Bauer publication that explains the impact on "Overall

Preference" of any individual attribute. For example, there is no data telling us what the impact of delivering "Easier to Rinse" has on the "Overall Preference" and there is no data telling us the "Overall Preference" that would be achieved if "Easier to Rinse" was improved. Therefore, the Bauer publication does not disclose the "base preference", "downside" and "upside" aspects of independent claim 1 of the present invention. For at least this reason, independent claim 1 is patentable over the Bauer publication.

Claims 2-7 are patentable over the Bauer publication at least for depending from independent claim 1. Independent claim 8 also includes the elements of a "base preference", "upside" and "downside". Therefore, independent claim 8 and its dependent claims 9-14 are patentable over the Bauer publication. Independent claim 15 includes the elements of a "base preference", "upside" and "downside". Therefore, independent claim 15 and its dependent claim 16 are patentable over the Bauer publication. Independent claim 19 includes the elements of "base preference", "upside" and "downside", as well as the method by which these elements are calculated. Therefore, independent claim 19 is likewise patentable over the Bauer publication. Additionally, the Examiner does not address how the Bauer publication discloses the additional elements of claim 19. For these reasons, Appellants respectfully request that the rejection of claims 1-16 and 19 over the Bauer publication be reversed.

3. Rejection of claims 20-30 Under 35 U.S.C. §103(a).

In order to establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143. The Examiner bears the initial burden of establishing the *prima facie* case. See In re Piasecki, 223 U.S.P.Q. 785,787, 745 F.2d 1468, 1471 (Fed. Cir. 1984). Appellants respectfully submit that the Bauer publication does not teach or suggest all of the limitations of the invention as claimed and therefore, a *prima facie* case of obviousness has not been established.

As previously discussed herein and with respect to independent claim 20, the Bauer publication does not disclose calculating an upside and it does not disclose calculating a downside based on preference results. Because the Bauer publication does not teach or suggest each element of the invention of claim 20, Appellants respectfully submit that claim 20 is patentable over the Bauer publication. With respect to independent claim 21, the Bauer publication does not disclose a test results interpretation system including a computer code adapted to calculate product preference for a product by incorporating preference results and nonpreferential results. Because the Bauer publication

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does not teach or suggest each element of the invention of claim 21. Appellants respectfully submit that claim 21 is patentable over the Bauer publication. Dependent claims 22-30 are patentable over the Bauer publication at least for depending from independent claim 21. Appellants respectfully request that the rejection of claims 20-30 over the Bauer publication be reversed.

Conclusion

For the reasons stated above it is Appellants' position that the Examiner's rejection of claims has been shown to be untenable and should be **reversed** by the Board.

Please charge the $500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Amended Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutional fees which are due may also be charged to deposit account number 11-0875.

The undersigned may be reached at: (920) 721-2433.

Respectfully submitted,

WILLIAM E. HARVEY ET AL.

By: Alyssa A. Gudkowski

Alyssa A. Gudkowski
Registration No.: 40,596

CERTIFICATE OF TRANSMISSION

I, Mary L. Marchant, hereby certify that on May 25, 2007 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.

Mary L. Marchant

Mary L. Marchant

K-C Docket No.: 18,996
Serial No.: 10/750,016

Claims Appendix

The claims on appeal are:

1. A method for determining preference results for a product having an attribute, the method comprising:

calculating a base preference for the product;

calculating a downside for the product;

calculating an upside for the product; and

comparing the base preference, the downside and the upside to identify product attributes affecting preference results.

2. The method of claim 1, wherein the base preference is an overall preference for the product where no test subject prefers the product on its delivery of the attribute.

3. The method of claim 1, wherein the base preference is the ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute.

4. The method of claim 1, wherein the downside is an overall preference above the base preference attributable to the attribute.

5. The method of claim 1, wherein calculating the downside for the product includes taking the difference between a base preference and an overall preference, wherein the overall preference is the ratio of the number of test subjects who preferred the product overall to the total number of test subjects.

6. The method of claim 1, wherein the upside is an overall preference attributable to the maximum potential attribute preference.

7. The method of claim 1, wherein calculating an upside for the product includes taking the difference between an overall preference and a best preference, where the best preference is the ratio of the number of test subjects who preferred the product both overall and with respect to the attribute to the number of test subjects who preferred the product with respect to the attribute.

8. A method for developing a product having first and second attributes, the method comprising:

calculating a base preference, a downside, and an upside for the first attribute;

calculating a base preference, a downside, and an upside for the second attribute;

comparing the calculations to determine which attribute is superior; and

developing the product with the superior attribute.

9. The method of claim 8, wherein the base preference is an overall preference for the product where no test subject prefers the product on its delivery of an attribute.

10. The method of claim 8, wherein the base preference is a ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute.

11. The method of claim 8, wherein the downside is an overall preference above the base preference attributable to the attribute.

12. The method of claim 8, wherein calculating the downside for the product includes taking the difference between a base preference and an overall preference, wherein the overall preference is the ratio of the number of test subjects who preferred the product overall to the total number of test subjects.

13. The method of claim 8, wherein the upside is an overall preference attributable to the maximum potential attribute preference.

14. The method of claim 8, wherein calculating an upside for the product includes taking the difference between an overall preference and a best preference, where the best preference is the ratio of the number of test subjects who preferred the product both overall and with respect to the attribute to the number of test subjects who preferred the product with respect to the attribute.

15. A method for determining preference results for a product having an attribute, the method comprising:

calculating a base preference for the product, wherein the base preference is an overall preference where no test subject prefers the product on its delivery of the attribute;

calculating a downside for the product, wherein the downside is an overall preference above the base preference attributable to the attribute;

calculating an upside for the product, wherein the upside is an overall preference attributable to the maximum potential attribute preference and

comparing the base preference, the downside and the upside to identify product attributes affecting preference results.

16. The method of claim 15, wherein the base preference is the ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute.

17. (Canceled)

18. (Canceled)

19. A method for determining preference results from test subjects attributable to an attribute of a product, the method comprising:

calculating a base preference for the product, where the base preference is the ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute;

calculating a downside for the product by taking the difference between the base preference

and an overall preference, where the overall preference is the ratio of the number of test subjects who preferred the product overall to the total number of test subjects;

calculating an upside for the product by taking the difference between an overall preference and a best preference, where the best preference is the ratio of the number of test subjects who preferred the product both overall and with respect to the attribute to the number of test subjects who preferred the product with respect to the attribute and

comparing the base preference, the downside and the upside to identify product attributes affecting preference results.

20. A test results interpretation system comprising:

a computer;

a computer code resident on the computer, wherein the code is adapted to calculate product preference upside and downside based on preference results; and

means for incorporating nonpreferential results into the product preference calculation.

21. A test results interpretation system comprising:

a matrix of responses including preference results by input choices;

a computer code resident on a computer adapted to calculate product preference for a product by incorporating preference results and nonpreferential results.

22. The system of claim 21, wherein the computer code is adapted to calculate a base preference for the product.

23. The system of claim 22, wherein the base preference is the overall preference for the product where no test subject prefers the product on its delivery of an attribute.

24. The system of claim 22, wherein the base preference is the ratio of the number of test subjects who preferred the product overall but not with respect to the attribute to the number of test subjects who did not prefer the product with respect to the attribute.

25. The system of claim 21, wherein the computer code is adapted to calculate a downside for the product.

26. The system of claim 25, wherein the downside is an overall preference above a base preference attributable to the attribute.

27. The system of claim 25, wherein calculating the downside for the product includes taking the difference between a base preference and an overall preference, wherein the overall preference is the ratio of the number of test subjects who preferred the product overall to the total number of test subjects.

28. The system of claim 21, wherein the computer code is adapted to calculate an upside for the product.

29. The system of claim 28, wherein the upside is an overall preference attributable to the maximum potential attribute preference.

30. The system of claim 28, wherein calculating an upside for the product includes taking the difference between an overall preference and a best preference, where the best preference is a ratio of a number of test subjects who preferred the product both overall and with respect to an attribute to the number of test subjects who preferred the product with respect to the attribute.

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Evidence Appendix

None.

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Related Proceedings Appendix

None.